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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-673

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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As we interpret it, petitioner's primary point is principally that the lower court erroneously gave to the statute an expansive interpretation, whereas, according to petitioner, comparison with the World War II excess profits tax law indicates Congress intended the Korean law, involved here, to have a narrow, restrictive meaning.

We believe it is fair to say the petitioner, having no conflict to rely upon, and defending a case involving a tax law long since repealed, and a case of no wide public or governmental interest but involving unique facts and circumstances never likely to recur, is simply claiming the

decision below is wrong,[1] and petitioner wants another hearing.[2]

As to the alleged significance of the differences between the World War II law and the Korean law, such differences support the decision below rather than otherwise. The history of the subject clearly shows the later law was intended to be applied more liberally than the earlier law.

The World War II law related to a period of all-out war effort, demanding extreme sacrifices. The Korean law related to a period of limited war, during which much of the economy was subject to conditions of business more or less as usual. This radical difference in the two periods was taken into account in measuring the impact of the respective taxes, and, more importantly here, in the application of the provisions for relief in certain circumstances.

When Congress first considered enactment of the Korean excess profits tax the Ways and Means Committee expressed the opinion that such a tax "enacted at this time should not be too severe in character" because it was "likely that an emergency will continue for an indefinite period."[3]

In discussing the bill on the floor of the House, Representative Cooper, of the Ways and Means Committee, who was in charge of the bill, commented:[4]

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1. *Cf. Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

2. *Cf.* the following in this petitioner's brief (p. 11) in opposition to certiorari to review *Mid-Southern Foundation* v. *C.I.R.*, 262 F.2d 134 (6th Cir. 1958) involving another provision of the Korean law:

> "[T]he decision below is correct; there is no conflict; and the question, a narrow and highly technical one, is of no general importance. The Korean War excess profits tax terminated on December 31, 1953 (67 Stat. 175), and to date the issue has been raised only in this case and one other (*Kentucky Farm & Cattle Co.* [30 T.C. 1355] * * *"

Certiorari was denied, 359 U.S. 991.

3. H.R.Rep. No. 3142, 81st Cong., 2d Sess., p. 2 (1950); 1951-1 C.B. 188.

4. 96 Cong.Rec. 81st Cong., 2d Sess., Part 12, p. 16124.

> "This excess profits tax bill is patterned very closely along the lines of the excess profits tax law of World War II, but is much more liberal in many provisions and deals much more leniently with the taxpayer than did the Excess Profits Tax Act of World War II."

Representative Dingell, also of the Ways and Means Committee, when explaining the bill to Congress, observed:[5]

> "This bill is much more equitable and liberal than the World War II excess-profits tax law. Many of the complaints which were levied at the World War II law and suggestions which were made as to how the new law should be written have been taken care of in this bill."

In its report on the bill, the Senate Finance Committee said:[6]

> "The World War II statute was much less generous than either your committee's bill or the House bill, * * * Your committee believes that the more generous provisions provided in this bill are necessary since the emergency may be of long duration requiring substantial increases in productive facilities."

Senator George, when opening the discussion of the Korean law on the floor of the Senate on December 20, 1950, said[7] the problem is "much more difficult under present conditions than in the case of an economy which has been fully mobilized for war."

As to relief from the excess profits tax, the Korean law was very different from the World War II law. Major

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5. *Id.* at p. 16126.

6. Sen.Rep. No. 2679, 81st Cong., 2d Sess., p. 12 (1950); 1951-1 C.B. 248.

7. 96 Cong.Rec., 81st Cong., 2d Sess., Part 12, p. 16767.

changes were made both as to the conditions for qualifying for relief and as to the measure of the amount of relief.

Changes from the World War II relief provisions were made largely because of dissatisfaction with the way §722 of that law had worked out. It was felt that, because of the difficult administrative processes involved under that section, in many cases taxpayers had failed to get the relief to which they were properly entitled, and which Congress had intended they should have.[8]

The principal difference between the two laws, in so far as relevant here, was that under the World War II law each hardship case was separately analyzed, in an effort to arrive at a fair measure of relief, whereas under the Korean law objective tests of general application were established. It was considered better to risk possibly imperfect adjustments in some instances than to have all the problems and speculations which were involved under the former law in striving for more refined results.[9]

Under the World War II law, after establishing qualification, it was necessary to make a theoretical determination of what earnings would have been if the abnormality had not occurred. Under the Korean law, the amount of relief was determined by reference to industry average rates of return, as proclaimed by the Secretary of the Treasury (§447). However, to avoid burdening the administration of the tax with trivial claims, if application of this formula did not produce a credit which exceeded 110% of the taxpayer's credit calculated in the normal way, no relief was granted, irrespective of the degree of actual adverse effect of the abnormality on the particular taxpayer (§442 (c) and (d)).

For example, if a corporation, for one reason or another, ordinarily earned little on its assets, and its normal production was diminished because of an unusual and peculiar

8. 96 Cong.Rec., 81st Cong., 2d Sess., Part 12, pp. 16769-16770; H.R.Rep. No. 3142, *supra*, at pp. 15-16; 1951-1 C.B. 197; Sen.Rep. No. 2679, *supra*, at pp. 17-18; 1951-1 C.B. 251-252.

9. 96 Cong.Rec., 81st Cong., 2d Sess., Part 12, p. 16770; Sen.Rep. No. 2679, *supra*, at pp. 17-18; 1951-1 C.B. 251-252.

event, by say *30%*, and the industry rate of return on its assets produced an amount which was *more* than 110% of its actual income, it *was* entitled to relief (in an amount determined by application of the industry rate of return). On the other hand, if a taxpayer in the same industry, for whatever reason, ordinarily had a high rate of earnings on its assets, and its normal production was diminished, because of an unusual and peculiar event, by say *50%*, and the industry rate of return on its assets produced an amount which was *less* than 110% of its actual income, it was *not* entitled to relief, even though it was very severely affected by the qualifying abnormality, and relatively more so than the first corporation.

In the second case, although the corporation otherwise would clearly qualify for relief, it was *not* granted relief because, despite the abnormality, it earned on its assets at a rate more than the average of its competitors. On the other hand, the first corporation, while it suffered relatively less from the abnormality, *was* granted relief, since it earned on its assets at a rate less than the average of its competitors.

Thus, the objective of the relief provisions of the Korean law was to grant in a hardship case relief which would put the affected taxpayer on a par with its competitors, but not to grant relief in a hardship case if the affected taxpayer nevertheless earned on its assets at a rate not less than the average of its competitors.

It would seem hard to challenge the reasonableness, in respect to a burdensome excess profits tax, of merely putting a taxpayer who suffered an abnormality on a par with its competitors.[10]

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10. Consistent with this philosophy, under the Korean law the following classes of corporations were permitted automatically to use industry rates of return in calculating their excess profits tax credits:

1. New corporations.

2. Old corporations which during the base period made a substantial change in business.

3. Old corporations which during the base period substantially increased their capacity for production or operation. §§445, 443 and 444.

Petitioner further argues (p. 8) under its primary point that application of the World War II law relief provisions involved "the necessity for 'subjective judgments' "; that the Korean law was designed to grant relief in cases not involving subjective judgments, and only in cases involving physical "events"; that the present case involves making subjective judgments, and that, therefore, it should be held this case does not come within the allegedly narrow restrictive relief provisions of the Korean law.

Passing the point that again petitioner is simply arguing that the decision below is wrong, the fact of the matter is that relief here is claimed, not on the basis of "subjective judgments," but because of the occurrence of a number of "unusual" and "peculiar" *objective* "events" and *objective* "temporary economic circumstances." Respondent's claim arises out of the circumstances that World War II created an urgent and excessive demand for respondent's steel products. In its all-out effort to meet that demand, respondent greatly accelerated the exhaustion of its high quality coal and iron ore mines, leaving respondent in the post-war "base period" years with only inferior raw materials. It was not until 1949 respondent was able, by the inauguration of large unique expensive beneficiating plants and processes, to offset this condition. War-induced shortages of men and material during the base period somewhat delayed the completion of these facilities, but even in the absence of such conditions there is the question whether such facilities could have been completed before the end of 1947. As a result, in 1947 and 1948 respondent was required (a) to use in its blast furnaces abnormally poor quality coal and iron ore from its own mines, (b) to purchase unsatisfactory coal, the only kind available, to supplement its own production, and (c) to purchase and use in its open hearth furnaces poor quality and high-priced scrap to make up for the lack of a sufficient quantity of more desirable and less expensive hot metal, such lack resulting from the poor quality blast furnace burdens. In consequence, its production

and earnings in 1947 and 1948 were far less than they would have been if it had been able to get its new beneficiating facilities into operation by the beginning of 1947.

We submit it is not necessary to read §442(a)(1) "expansively" (p. 9) to conclude that here "events" occurred within the base period within the meaning of the statute, and that there were "temporary economic circumstances" within any ordinary meaning of those terms.

Petitioner's secondary argument is that this case is "administratively important" because a decision for the taxpayer "could weaken public confidence in the fairness of the federal taxing system" (p. 13). It is argued this might result because "the notion that the effects of World War II could be sifted out and made a ground for relief had no appeared prior to the opinion of the court of appeals in this case" (p. 12), and, if this is allowed to stand, this "large," (p. 13) corporate taxpayer, and perhaps one other, "will have the opportunity to obtain excess profits tax relief on a theory unavailable to all other taxpayers similarly situated" (p. 13).

The premises on which this argument is based are either completely false or are inferences for which there is no support in the record. This Court, after reviewing the facts of this case, as set forth in the opinions below, surely will recognize that there is virtually no chance whatever of there having been any other taxpayer "similarly situated" —certainly in degree, and probably in all other respects. The facts of this case are unique and peculiar to this particular taxpayer. Such a case is not appropriate for certiorari.[11]

Furthermore, it is impossible to know whether, in cases of other taxpayers, perhaps with smaller amounts involved, the Internal Revenue Service administratively, and

11. *Cf. United States* v. *Shannon*, 342 U.S. 288, 294, 295 (1952); *United States* v. *Jordan*, 342 U.S. 911 (1952).

without litigation (and therefore without publicity), over the years has allowed relief on account of war-induced conditions of various sorts, and possibly in situations less meritorious than those here. We have never heard of any taxpayer being *denied relief* on this ground.

While it is a separate and wholly different subject, petitioner under this section of its petition asks the Court to review the case because of the amount involved, saying "the fiscal impact of this case is itself important" (p. 13).

We had been led to believe it long ago had been established that, as a general rule, the amount involved is not recognized as a good reason to ask this Court to exercise its discretion and grant certiorari.[12] It would seem this should be true *a fortiori* where, as here, the lower court has remanded for trial.[13]

Petitioner says (p. 12, fn. 5) the amount involved "turning on the raw materials issue, amounts to more than $107 million of tax, plus interest, which brings the total to approximately $230 million." Petitioner does not bring out that the bulk of this amount is for tax *not paid* for 1951 and 1953 and interest thereon. The amounts are in respect to taxes claimed to have been payable twenty years ago. On the other hand, a decision for the taxpayer would result in a *refund* of only a fraction of the total amount in issue. The Court may confidently assume the "fiscal impact" of such a refund would be a relatively infinitesimal item in the Federal budget.

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12. *Cf.* Address of Chief Justice Hughes, 20 American Bar Association Journal, 341 (1934).

13. *Cf. Brotherhood of Locomotive Firemen, etc.* v. *Bangor & Aroostook RR. Co.*; 389 U. S. 327 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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